

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

BRANDON EUGENE HUNTER,

No. 2:22-cv-1281 SCR P

Plaintiff,

v.

JACKOWITZ, et al.,

ORDER AND FINDINGS AND
RECOMMENDATIONS

Defendants.

Plaintiff is a county inmate proceeding pro se with a civil rights action under 42 U.S.C. §1983. On May 10, 2024, defendants filed three motions, including a motion to compel plaintiff to participate in a deposition. (ECF No. 31.) After the court granted two extensions of time, plaintiff's responses to those motions were due on September 10, 2024. (ECF No. 39.) Plaintiff has not filed responses to defendants' motions. For the reasons set forth below, this court will recommend this action be dismissed.

BACKGROUND

Plaintiff filed this action on July 20, 2022. (ECF No. 1.) After dismissing the original complaint for failure to state any claims under §1983, this court found plaintiff stated some cognizable claims for relief in his first amended complaint. (ECF Nos. 11, 12.) Plaintiff was given the option of proceeding on the cognizable claims or filing a second amended complaint.

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1 Plaintiff chose to proceed on the cognizable claims in the first amended complaint. (ECF No.
2 13.)

3 After defendants answered the first amended complaint, on October 23, 2023, the court
4 issued a Discovery and Scheduling Order. (ECF No. 20.) When plaintiff failed to provide
5 defendants with timely discovery responses, defendants filed a motion to compel on February 23,
6 2024. (ECF No. 21.) The court granted the motion with respect to defendants' interrogatories
7 and requests for production of documents. (ECF No. 30.) The court ordered plaintiff to respond
8 to the discovery by May 3, 2024. (*Id.* at 5.) Plaintiff was warned that if he failed to provide
9 defendants with timely responses, the court would consider imposing sanctions, which could
10 include dismissal of the action. (*Id.* at 4.)

11 When plaintiff again failed to provide defendants with timely discovery responses and
12 failed to appear for a properly noticed deposition, defendants filed a second motion to compel and
13 a motion for sanctions on May 10, 2024. (ECF No. 31.) Plaintiff then sought a 180-day
14 extension of time on all matters due to the death of his mother. (ECF No. 32.) On July 19, the
15 court found plaintiff failed to demonstrate good cause for a 180-day extension of all deadlines and
16 ordered plaintiff to file an opposition to defendants' motions within 30 days of the date of the
17 order. (ECF No. 35.) When plaintiff sought reconsideration of that July 19 order, this court gave
18 plaintiff an additional three weeks to file his responses. (Aug. 20, 2024 Order; ECF No. 39.)
19 They were due September 10, 2024. In the August 20 Order, the court again warned plaintiff that
20 if he failed to file responses as ordered, the court would likely recommend he be sanctioned.
21 Plaintiff was informed that sanctions may include restrictions on the evidence plaintiff will be
22 permitted to present or dismissal of this action. (*Id.* at 3.)

23 The due date for plaintiff's responses to defendants' May 10 motions has passed and,
24 despite having over five months to do so, plaintiff has not filed responses to the motions. Plaintiff
25 has also failed to comply with the August 20 Order.

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SANCTIONS

I. Legal Standards

Federal Rule of Civil Procedure 37(d) authorizes the court to issue sanctions when a party fails to serve answers to properly served interrogatories or requests for inspection of documents. Fed. R. Civ. P. 37(d)(1)(A). Rule 37(b) authorizes sanctions for noncompliance with a discovery order. Sanchez v. Rodriguez, 298 F.R.D. 460, 463 (C.D. Cal. 2014) (“[W]here a party's noncompliance with a discovery order is the asserted basis for dismissal as a sanction, the court must employ the discovery-specific Rule 37 rather than relying on Rule 41(b).”). The court may impose the same broad range of sanctions under subsections (b) or (d), including “prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters into evidence,” “staying further proceedings” until the party has complied with discovery requirements, and “dismissing the action or proceeding in whole or in part.” Fed. R. Civ. P. 37(d)(3) (citing Rule 37(b)(2)(A)); Fed. R. Civ. P. 37(b)(2)(A); see also, e.g., Wyle v. R.J. Reynolds Indus., Inc., 709 F.2d 585, 589 (9th Cir. 1983) (“Federal Rule of Civil Procedure 37 authorizes the district court, in its discretion, to impose a wide range of sanctions when a party fails to comply with the rules of discovery.” (internal citations omitted)).

17 The threshold requirement for terminating sanctions under Rule 37(b) is that the conduct
18 has been intentional. See In re Exxon Valdez, 102 F.3d 429, 432 (9th Cir. 1996) (dismissal under
19 Rule 37(b) requires a threshold showing that the violation is due to willfulness, bad faith, or fault
20 of the non-moving party). Where this requirement is met, the Ninth Circuit employs a “five-part
21 test, with three subparts to the fifth part” to determine whether a terminating sanction under Rule
22 37(b)(2) is just:

23 (1) the public's interest in expeditious resolution of litigation; (2) the
24 court's need to manage its dockets; (3) the risk of prejudice to the
25 party seeking sanctions; (4) the public policy favoring disposition of
26 cases on their merits; and (5) the availability of less drastic sanctions.
The sub-parts of the fifth factor are whether the court has considered
lesser sanctions, whether it tried them, and whether it warned the
recalcitrant party about the possibility of case-dispositive sanctions.

27 Connecticut Gen. Life Ins. Co. v. New Images of Beverly Hills, 482 F.3d 1091, 1096 (9th Cir.
28 2007) (footnotes omitted). “This ‘test’ is not mechanical. It provides the district court with a way

1 to think about what to do, not a set of conditions precedent for sanctions or a script that the
2 district court must follow.” Id.

3 As this court has recognized previously, as a pro se litigant plaintiff is entitled to some
4 lenience. Nevertheless, he is bound by the rules and this court’s orders.. See Ghazali v. Moran,
5 46 F.3d 52, 54 (9th Cir. 1995). “A party’s lack of counsel may be considered in evaluating the
6 willfulness of discovery violations and the failure to obey orders and in weighing the other factors
7 regarding dismissal, but pro se status does not excuse intentional noncompliance with discovery
8 rules and court orders.” Sanchez, 298 F.R.D. at 470 (collecting cases).

9 **II. Discussion**

10 **A. Willfulness**

11 In the April 4, 2024 order granting in part defendants’ motion to compel, the court found
12 plaintiff’s opposition to the motion to compel responses to interrogatories and requests for
13 admissions had no merit. Plaintiff failed to show he was unable to respond to the discovery
14 within the forty-five days required. In fact, plaintiff had responded to defendants’ requests for
15 admissions with only minimal delay. (See ECF No. 30 at 4.)

16 Plaintiff’s May 28 motion for a 180-day extension of all deadlines, shows that he
17 understood that he was required to provide defendants with timely responses to interrogatories
18 and requests for admissions. Similarly, plaintiff’s motion for reconsideration of the order denying
19 him 180 days showed that he understood the requirements. While the court did not grant plaintiff
20 the full time extension of time he requested, the court did give him significant additional time to
21 respond to defendants’ motions. To date, plaintiff has had over five months to respond. On this
22 record, plaintiff has intentionally failed to comply with the discovery rules and with the court’s
23 orders.

24 Plaintiff’s willful refusal to comply with discovery is also shown by his refusal to attend
25 his deposition. Defendants scheduled a deposition for May 7, 2024. According to the declaration
26 of defendants’ counsel, which plaintiff has not disputed, the court reporter, videographer, and
27 counsel appeared at the jail for the deposition on May 7. Plaintiff provided defendants with no
28 prior notice that he did not intend to participate in the deposition. On May 7, while at the jail,

1 defendants' counsel was told that plaintiff refused to appear for the deposition. (See Decl. of M.
2 Mendoza; ECF No. 31-1.) There is ample evidence that plaintiff has willfully chosen
3 noncompliance with the discovery rules and with this court's orders.

4 **B. The Five-Factor Test**

5 First, the public's interest in expeditious resolution of litigation has been thwarted by
6 plaintiff's failure to properly participate in discovery. Plaintiff's failure to respond to the
7 discovery and related motions has prevented this case from advancing out of the discovery phase,
8 which was originally scheduled to end on February 23, 2024, nearly eight months ago. (See Disc.
9 and Sch. Order; ECF No. 20.)

10 Second, the court's need to manage its docket also weighs in favor of dismissing this
11 action. This case has been stalled for many months. It has required the court's attention and
12 effort for the sole purpose of trying to encourage plaintiff's participation in his own lawsuit – to
13 no avail. Especially in such a burdened court,¹ the interests of judicial economy weigh strongly
14 in favor of dismissing this action. Further investment of judicial resources in plaintiff's claims,
15 which plaintiff has failed to properly pursue, is not justifiable. See Ferdik v. Bonzelet, 963 F.2d
16 1258, 1261 (9th Cir. 1992) (giving significant weight to considerations of judicial economy).

17 Third, the risk of prejudice to defendants is high because they cannot fairly defend against
18 plaintiff's claims without knowing the evidence plaintiff intends to present. Plaintiff's actions
19 impair defendants' ability to seek summary judgment or go to trial and threaten to interfere with
20 the rightful decision of the case. See In re Phenylpropoanolamine Products Liability Litigation,
21 460 F.3d 1217, 1227 (9th Cir. 2006). It is fundamentally unfair for defendants to remain
22 involuntarily engaged in litigation that plaintiff is not moving forward to conclusion.

23 Fourth, the public policy favoring disposition of cases on their merits weighs against
24 dismissal. Yourish v. Cal. Amplifier, 191 F.3d 983, 992 (9th Cir. 1999). Here, however, this
25 factor carries little weight in light of plaintiff's record of significant delay and non-involvement in

26 ¹ The Eastern District of California carries one of the largest and most heavily weighted caseloads
27 in the nation. See Office of the Clerk, United States District Court, Eastern District of California,
28 2023 Annual Report, "Workload Statistics," p. 33 (2023) ("[O]ur weighted caseload far exceeds
the national average ... ranking us 7th in the nation and 1st in the Ninth Circuit.").

1 his own case. See Leon v. IDX Sys. Corp., 464 F.3d 951, 960-61 (9th Cir. 2006) (policy favoring
2 merits adjudication is not, without more, sufficient to outweigh other factors).

3 Fifth, this court finds the imposition of sanctions short of dismissal are highly unlikely to
4 encourage plaintiff's compliance with discovery and orders. This court has twice threatened
5 sanctions and made clear that dismissal of this action was a possible sanction. Monetary
6 sanctions are unlikely to have any effect on plaintiff's behavior. As many courts have
7 recognized, "because plaintiff is proceeding in forma pauperis due to documented indigency,
8 plaintiff would be unable to pay a monetary sanction and the imposition of such a sanction would
9 be futile as a means of inducing him to comply with this Court's discovery orders." Sanchez, 298
10 F.R.D. at 466 (citing Kindred v. Doe, No. SACV 12-1996-ABC (RNB), 2014 WL 793095, *3
11 (C.D. Cal. Feb. 26, 2014)); see also Henderson v. LOR, No. 2:16-cv-2833 TLN AC P, 2019 WL
12 541014, at *3 (E.D. Cal. Feb. 11, 2019); Berna v. Powell, No. 1:15-cv-0283 AWI EPG, 2016 WL
13 6693505, at *4 (E.D. Cal. Nov. 14, 2016). The fifth factor thus supports the issuance of
14 terminating sanctions.

15 **III. Conclusion**

16 The history of this case shows that plaintiff has willfully failed to respond to discovery
17 properly propounded by defendants. Defendants have been forced to expend resources and time
18 filing two motions to compel and attending a properly scheduled deposition that plaintiff refused
19 to attend. Considering the five factors set out above, dismissal of this action is appropriate under
20 Rules 37(b) and 37(d).

21 For the foregoing reasons, the Clerk of the Court IS HEREBY ORDERED to randomly
22 assign a district judge to this case.

23 Further, IT IS RECOMMENDED that

- 24 1. This case be dismissed for plaintiff's failure to comply with the discovery rules and
25 with court orders.
- 26 2. Defendants' motions to compel and for sanctions (ECF No. 31) be dismissed as moot.

27 These findings and recommendations will be submitted to the United States District Judge
28 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days

1 after being served with these findings and recommendations, either party may file written
2 objections with the court. The document should be captioned "Objections to Magistrate Judge's
3 Findings and Recommendations." The parties are advised that failure to file objections within the
4 specified time may result in waiver of the right to appeal the district court's order. Martinez v.
5 Ylst, 951 F.2d 1153 (9th Cir. 1991).

6 DATED: October 15, 2024

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9 SEAN C. RIORDAN
10 UNITED STATES MAGISTRATE JUDGE
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